

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Nancy L. Haugan; Fredrick S. Sturdevant;
Deborah S. Mason; Katie Schmucker; William
Schmucker; Aden E. Yoder; Jerry R. Yoder;
Philip R. Yoder

CASE 76D-0040-R-2022
76D 212771-00
76D 213700-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claims 76D 212771-00 and 213700-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. These claims received an issue remark. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order. Claims

examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims did not receive any objections or notices of intent to appear.

The Court consolidated these claims into Water Court Case 76D-0040-R-2022 on August 4, 2022. The court held a status conference to explain the issue remarks with the claimants and determine how to proceed. Subsequently the Court set a filing deadline by which the claimants were to file resolution documents. Claimants filed a stipulation on November 28, 2022. The Court then requested clarification regarding the stipulation and several unresolved issue remarks. Frederick Sturdevant and Nancy Haugan filed a response on June 1, 2023.

Information referenced in this Master's Report. Including the stipulation, may be found on the Court's Full Court Enterprise docketing system.

FINDINGS OF FACT

1. Both above-captioned claims appeared with the following issue remark:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 76D 212771-00, 76D 213700-00.

2. Claim 76D 212771-00 also appeared with the following issue remarks:

USE OF THE DOBLE DITCH TO CONVEY WATER TO THE PLACE OF USE MAY BE QUESTIONABLE.

THIS CLAIM WAS NOT INCLUDED IN THE BASIN 76D TEMPORARY PRELIMINARY DECREE ISSUED 03/22/1984.

CLAIM FILED LATE 10/19/88. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

USDA AERIAL PHOTOGRAPH (1965) APPEARS TO INDICATE 0.0 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

USDA AERIAL PHOTOGRAPH NO. 379-40, DATED 08/10/1979 APPEARS TO INDICATE 43.0 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

POINT OF DIVERSION AND DITCH NAME WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMED SOURCE MAY BE QUESTIONABLE. BASED ON AVAILABLE DATA, THE SOURCE MAY BE SURFACE WATER FROM AN UNNAMED TRIBUTARY OF FARRELL CREEK.

3. Claim 76D 213700-00 also appeared with the following issue remarks:

THIS CLAIM WAS NOT INCLUDED IN THE BASIN 76D TEMPORARY PRELIMINARY DECREE ISSUED 03/22/1984.

CLAIM FILED LATE 03/23/89. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

THE LINCOLN COUNTY WATER RESOURCES SURVEY (1965) APPEARS TO INDICATE 0.00 ACRES IRRIGATED.

USDA AERIAL PHOTOGRAPH NO. 379-40, DATED 08/10/1979 APPEARS TO INDICATE 24.0 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

DITCH NAME WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

Over-filing Issue Remark

4. Both above-captioned claims are based on the same Notice of Appropriation filed by James W. Butts with a priority date of July 28, 1937. The

appropriation lists a flow rate of one cubic foot per second (CFS). The cumulative claimed flow rate of these claims is 2.74 CFS.

5. Claimants' stipulation is intended to resolve the over-filing issue remark. Claimants agree to the following:

76D 213700-00 –

- a. The maximum flow rate of 1.0 CFS reduced to 203 GPM.

76D 212771-00 –

- a. The maximum flow rate of 1.74 CFS reduced to 245 GPM.

6. These requests would result in a reduction in each claimed flow rate. The cumulative total of these two new flow rates would be 448 gallons per minute, or 1 CFS.

7. The flow rate of Claim 76D 213700-00 should be described as 203 GPM. The flow rate of Claim 76D 212771-00 should be described as 245 GPM.

Source and Conveyance Issue Remarks on Claim 76D 212771-00

8. The Court sought clarification as to the point of diversion, means of diversion, and source name for Claim 76D 212771-00. Frederick Sturdevant and Nancy Haugen's June 1, 2023 filing included an explanation of how water is conveyed to the place of use. These claimants state that water is "transported to the place of use by pipeline" and that the water is initially diverted through a Doble Ditch on Young Creek. A marked-up map included with the filing indicates the referenced ditch is a Doble Ditch in the SW of Section 14, T37N, R28W. There are multiple ditches named "Doble Ditch" on the map including another Doble Ditch diverting water from Ferrell Creek in the NW of Section 11, T37N, R28W. Claimants Sturdevant and Haugen indicate those ditches are not part of the right claimed by Claim 76D 212771-00.

9. The original Statement of Claim filed by John Miller on October 19, 1988 indicates an intent to claim a headgate and ditch in the SW of Section 14, T37N, R28W with a means of conveyance of "pipeline."

10. The issue remarks regarding source and conveyance should be removed.

Irrigated Acres Issue Remarks

11. Claim 76D 212771-00 is for 46.00 acres in Section 11, T37N, R28W. The issue remarks regarding acreage on this claim are based on two data points. The first is the 1965 Water Resources Survey of Lincoln County indicating 0.00 acres irrigated in the claimed place of use. The second is United States Department of Agriculture (USDA) aerial photograph number 379-40 from August 10, 1979 indicating 43.00 acres irrigated in the claimed place of use. The claimed right is not discussed in the Survey's field notes. The claimed ditch is marked as existing on the Survey map, but there is no indication it is not being used. It is unclear as to why irrigation was not documented under those circumstances. The 43.00 verified acres is only three acres difference from the claimed 46.00 acres. A variety of factors could explain the three-acre discrepancy.

12. Claim 76D 213700-00 is for 35.00 acres in Section 14, T37N, R28W. The issue remarks regarding acreage on this claim are based on two data points. The first is the 1965 Water Resources Survey of Lincoln County which, like Claim 76D 212771-00, indicates 0.00 acres irrigated. The second is also the USDA aerial photograph number 379-40 from August 10, 1979. Like Claim 76D 212771-00, the claimed right is not discussed in the Survey's field notes. The claimed ditch is marked as existing on the Survey map, but there is no indication it is not being used. It is unclear as to why irrigation was not documented under those circumstances. The DNRC verified 24.00 acres irrigated and added the issue remark. The photograph used is included in the claim file. Based on the photograph, it is difficult to determine which acres were viewed as irrigated or not.

13. In the parties' settlement agreement, the parties agree not to make changes to the historical elements of the above-captioned claims notwithstanding the flow rate of each claim.

14. The acreage issue remarks should be removed from both above-captioned claims.

15. The issue remarks remaining on the above-captioned claims are notice-type issue remarks which have served their purpose and should be removed.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

CONCLUSIONS OF LAW

1. The changes to flow rate of the above-captioned claims may be made because the changes result in a reduction of an element which does not require evidence overcoming the prima facie status of the claim.

2. The over-filing issue remark on each above-captioned claim may be removed because the reductions in flow rate result in a cumulative flow rate beneath that of the claimed Notice of Appropriation.

3. Evidence in the record, including responsive information, resolves the remaining issue remarks on the above-captioned claims.

4. The place of use and acreage of the above-captioned claims may be decreed without modification because the issue remarks and information behind the remarks do not overcome the prima facie status of each claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are

served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Nancy L. Haugan
7983 W Kootenai Rd
Rexford, MT 59930

Fredrick S. Sturdevant
208 Turkey Track Dr
Rexford, MT 59930

Deborah S. Mason
49 Whitetail Dr
Rexford, MT 59930

Katie Schmucker
William Schmucker
4571 Kootenai Rd
Rexford, MT 59930

Aden E. Yoder
2866 Hanover Rd
Lewistown, MT 59457

Jerry R. Yoder
105 Mountain Lion Dr
Rexford, MT 59930

Philip R. Yoder
7210 W Kootenai Rd
Rexford, MT 59930

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 212771-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: FREDRICK S STURDEVANT
208 TURKEY TRACK DR
REXFORD, MT 59930

NANCY L HAUGAN
7983 W KOOTENAI RD
REXFORD, MT 59930 9752

Priority Date: JULY 28, 1937

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 10/19/88 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 245.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 46.00

Source Name: YOUNG CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSW	14	37N	28W	LINCOLN

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: DOBLE DITCH

Period of Use: APRIL 15 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	22.00		NESW	11	37N	28W	LINCOLN
2	24.00		NWSE	11	37N	28W	LINCOLN
Total:	46.00						

Remarks:

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 08/22/2001: FLOW RATE, VOLUME, AND MAXIMUM ACRES.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 213700-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners:

DEBBIE S MASON
49 WHITETAIL DR
REXFORD, MT 59930 9438

JERRY R YODER
105 MOUNTAIN LION DR
REXFORD, MT 59930

WILLIAM SCHMUCKER
4571 W KOOTENAI RD
REXFORD, MT 59930

KATIE SCHMUCKER
4571 W KOOTENAI RD
REXFORD, MT 59930

PHILIP R YODER
7210 W KOOTENAI RD
REXFORD, MT 59930 9428

Priority Date: JULY 28, 1937

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 03/23/89 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 203.00 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 35.00

Source Name: YOUNG CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWNWSW	14	37N	28W	LINCOLN

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: HEADGATE

Ditch Name: DOBLE DITCH

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00		NESWNW	14	37N	28W	LINCOLN
2	10.00		SESWNW	14	37N	28W	LINCOLN
3	4.00		SENWNW	14	37N	28W	LINCOLN
4	8.00		NWNWSW	14	37N	28W	LINCOLN
5	3.00		NWSWNW	14	37N	28W	LINCOLN
Total:	<u>35.00</u>						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

129039-00

213700-00